United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-7158

To be argued by
RICHARD H. WEBBER

United States Court of Appeals
FOR THE SECOND CIRCUIT

B

THE EASTERN MARINE & FIRE INSURANCE CO.,
Plaintiff-Appellant,

against

S.S. COLUMBIA, her engines, boilers, etc., ORIENTAL EXPORTERS, INC., and OGDEN SEA TRANSPORT, INC., as successor to SEA TRANSPORT, INC.,
Defendants-Appellees,

OGDEN SEA TRANSPORT, INC., as successor to SEA TRANSPORT, INC.,
Third-Party Plaintiff-Appellee,

against

JOHN PEMBERTON MOSSE, an Underwriter at Lloyd's, and INDEMNITY MARINE ASSURANCE CO., LTD.,
Third-Party Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANTS' REPLY BRIEF

HILL, RIVKINS, CAREY, LOESBERG, & O'BRIEN,
Attorneys for Plaintiff-Appellant and Third-Party Defendants-Appellants
96 Fulton Street
New York, N. Y. 10038
233-6171

ALAN S. LOESBERG
RICHARD H. WEBBER
Of Counsel

INDEX

TABLE OF CITATIONS

United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 76—7158

THE EASTERN MARINE & FIRE INSURANCE CO.,
Plaintiff-Appellant,

against

S.S. COLUMBIA, her engines, boilers, etc., ORIENTAL EXPORTERS, INC., and OGDEN SEA TRANSPORT, INC., as successor to SEA TRANSPORT, INC.,
Defendants-Appellees,

OGDEN SEA TRANSPORT, INC., as successor to SEA TRANSPORT, INC.,
Third-Party Plaintiff-Appellee,

against

JOHN PEMBERTON MOSSE, an Underwriter at Lloyd's and INDEMNITY MARINE ASSURANCE CO., LTD.,
Third-Party Defendants-Appellants.

APPELLANTS' REPLY BRIEF

ARGUMENT

POINT I

There is a real dispute as to whether or not the District Court properly applied the due diligence standard.

Appellees take the position, as they must, that the District Court did not hold, as a matter of law, that the owners of the S/S COLUMBIA had exercised due diligence

by merely appointing a surveyor to superintend the repairs of the vessel and having that surveyor be satisfied as to the adequacy and propriety of the repairs. A careful reading of the opinion below shows, on the other hand, that the District Court reached precisely such a holding.

Appellees attempt to buttress their position by arguing that the Court below could not have reached such a holding because appellees "never contended" that they were relieved of their responsibility by merely appointing a competent, independent marine surveyor. The fact is that appellants did so contend, at least implicitly, and still do as is evidenced by the lengthy quotation from *The Floridian*, 83 F.2d 949, 951 (2nd Cir. 1936) set forth at page 6 of the Appellees' Brief. Of course, even if the parties themselves were in agreement as to the applicable law, it by no means necessarily follows that the District Court applied that law.

Indeed, it is quite easy to see how the Court below could have misconstrued the holding of *The Floridian, supra,* for in addition to the language quoted by appellees, the following appears at page 951 of this Court's opinion in that case:

> All the work of reconditioning the ship was done at a responsible shipyard under the advice of a competent naval officer. *This was due diligence.* (Emphasis supplied).

However, it is submitted that both quotations are mere dicta and are, moreover, inconsistent with the long line of cases beginning with *The Colima*, 82 F. 665 (S.D.N.Y. 1897) which are discussed at some length at pages 9-12 of the Appellants' Brief. Indeed, the application of the literal language of *The Floridian, supra,* would operate to thoroughly emasculate the well-established rule that a shipowner's duty to exercise due diligence to make his vessel seaworthy is non-delegable. *The Floridian* was a

case in which no evidence was offered to show that the shipowner had left undone anything which he could have done to make the vessel seaworthy. Indeed, the opinion states, at page 950, that the steering chains which failed ". . . were taken apart, annealed according to the practice to renew their toughness, closely examined, and all defective links renewed. All the pins holding fair-leads were examined and replaced where it appeared advisable." The Court further found that the repair specifications detailed a close check and repair of the chains and that these specifications were carefully carried out. It is submitted that upon the basis of the facts found in *The Floridian,* the holding of the Court was that the overhaul and attendant repairs of the vessel were fully adequate and proper. In the circumstances, the passage quoted in Appellees' Brief, as well as that quoted herein, are no more than dicta and should be rejected by this Court as being an inaccurate statement of the law as it was in 1936 and as it has developed since.

Although it is submitted by appellants that a mere reading of the opinion demonstrates that the District Court decided this case upon a mistaken impression as to the applicable law, there is an aspect of the opinion which merits particular mention in this respect. If appellees are correct in their argument that the Court below found that the 1965 repairs to the S/S COLUMBIA were, in fact, proper, one would expect to find a statement to that effect in the Court's opinion. It cannot be denied that there is no such statement made anywhere in the opinion. Conversely, the absence of a finding as to the adequacy and propriety of the repairs substantiates appellants' argument that the action was decided by the District Court on an erroneous point of law, thereby permitting the Court below to write an opinion without giving consideration to the quality of the repairs. In other words, the District Court did not think that, as a matter of law, it had to decide whether the repairs were proper and adequate.

The brief of appellees is rife with hypothesis and conclusory language as to the meaning and implication of the opinion of the District Court. The fact of the matter is that nowhere in its opinion did the District Court indicate that it credited or discredited the testimony of one or another fact witness, that it credited or discredited the testimony and opinions of one or another of the expert witnesses or that the Court accepted or rejected any of the corroborating documentary evidence offered by the parties. In fact, there are no findings which are sufficient to support a legal conclusion that due diligence was exercised by the owners of the S/S COLUMBIA. Appellees may argue that the Court believed one witness or another and so on, but such rhetoric is no substitute for the missing findings of fact. In the absence of appropriate findings of fact, the only fair and reasonable conclusion is that the Court below applied a rule of law which made unnecessary findings of fact as to the propriety and adequacy of the 1965 repairs. It is this rule of law which appellants submit was wrongly formulated by the District Court.

POINT II

There is substantial evidence that the repairs were both inadequate and improper.

Appellees state that "Mechanical devices fail for many reasons other than inadequate or improper repairs", presumably to support their argument that the rudder casualty experienced by the S/S COLUMBIA was in consequence of some unknown defect. On the other hand, Mr. Daniel Salzarulo, an expert witness testifying on behalf of the shipowner, stated under cross-examination that while T-2 tankers had had a history of lost rudders, the only cause he knew of for these rudder losses had been fractured skegs (T. 156-157). It is not disputed that the skeg of the COLUMBIA was found to be undamaged at the vessel's dry-

docking in Singapore subsequent to the casualty. Thus, it would appear that testimony by shipowner's own expert witness supports the obvious conclusion that T-2 type vessels, of which at least 523 were launched prior to February 1, 1946 (The Design and Methods of Construction of Welded Steel Merchant Vessels 21, Table I (Washington 1947)) had no inherent problem with rudder pintles which could explain the COLUMBIA casualty. Parenthetically, if appellees were to have claimed that the casualty occurred in consequence of a latent defect the burden would have been upon them to establish this by a preponderance of the evidence. See United States Carriage of Goods by Sea Act, 46 U.S.C. § 1304 (2); *Interstate Steel Corp.* v. *S.S. Crystal Gem,* 317 F.Supp. 112 (S.D.N.Y. 1970).

Appellees argue at page 8 of their brief that "The more persuasive evidence given by appellees' witnesses was that the [locking device] used on the COLUMBIA was the method preferred by experienced marine surveyors." It is interesting to note that this conclusory statement is not substantiated by a reference to the trial transcript. It is not likely that omission was any casual oversight for in fact there is no evidence that any witness testifying on behalf of any party made such a statement, as a review of the transcript will reveal. Moreover, the mere fact that experienced marine surveyors might prefer a given solution for a problem does not mean that it is correct. It is the province of the trier of fact to determine whether a given repair is proper or adequate. In *California & Hawaiian Sugar R. Corp.* v. *Winco Tankers, Inc.,* 278 F.Supp. 648, 654 (E.D. La. 1968), the District Court pointed out:

> The usual custom of ship owners is not controlling. *The Intrapura,* 9 Cir. 1911, 190 F.711. The standard is not merely what ship owners usually do but what a reasonably prudent one might do—and not what he might do in another vessel, but in this vessel under the particular circumstances here present.

The fact of the matter is that this is a "prior history" case. There is no evidence that Mr. James E. Sweeney, the "experienced" marine surveyor from Pillatt & Sweeney Corp., who superintended the repairs to the COLUMBIA in 1964, ordered repairs in any way different from those ordered by Mr. Herman Berke, also of Pillatt & Sweeney Corp., at the 1965 drydocking. Yet, within a year of the 1964 drydocking, the lower pintle of the vessel was found to have dropped approximately 1" due to the pintle's backing out of the pintle nut. One wonders whether appellees would care to argue that due diligence had been exercised in respect of the 1964 repairs to the COLUMBIA in view of the fact that these were found to have been demonstrably inadequate by the time of the 1965 drydocking. Nevertheless, appellees continue to argue that due diligence was exercised in respect of the 1965 repairs to the vessel which, for all the evidence shows, were identical with the repairs performed in 1964. The S/S COLUMBIA, like the S/S HEDDERNHEIM, whose breakdowns were discussed in *The Heddernheim*, 39 F.Supp. 558 (S.D.N.Y. 1941), had a "prior history" which demonstrated the vessel's vulnerability to rudder problems, a history which the shipowners and their appointed superintending surveyor, Mr. Herman Berke, chose to ignore in the course of the 1965 drydocking.

It is respectfully submitted that the District Court, in the instant case, should have imposed on the owners of the S/S COLUMBIA the same standard of care as was imposed upon the owners of the HEDDERNHEIM. The fact that the Court below may have or may not have accepted the explanations of appellants' expert witnesses as to the cause of the casualty is not dispositive. In *The Heddernheim, supra*, the District Court found that due diligence had not been exercised although the Court was unable to accept without reservation either of the explanations put forward by expert witnesses testifying on behalf of cargo interests.

It is worthy of note that appellees have at no time offered any evidence to rebut appellants' explanation of the rudder casualty sustained by the S/S COLUMBIA. If the casualty occurred as explained by Mr. Edward Ganly, the distinguished marine engineer and naval architect who testified at trial on behalf of cargo interests, there can be only one reasonable conclusion; that is, that the 1965 rudder repairs were inadequate and improper.

CONCLUSION

The decision of the Trial Court should be reversed on the ground that due diligence to make the S/S Columbia seaworthy in fact was not exercised in fact by the owner of the vessel.

Respectfully submitted,

HILL, RIVKINS, CAREY, LOESBERG & O'BRIEN
Attorneys for Appellants

ALAN S. LOESBERG
RICHARD H. WEBBER
Of Counsel